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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 400

R. H. WRIGHT, INC.,
Petitioner,

vs.

CITY OF FORT LAUDERDALE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

R. H. WRIGHT, INC., a Florida corporation, petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Southern District of Florida. The opinion of the Court of Appeals is appended hereto and is reported in 329 F.2d 871.

The judgment of the Court of Appeals was dated March 26, 1964. A petition for rehearing, timely filed, was denied on June 10, 1964, and the issuance of a mandate was stayed for ninety days in order to permit petitioner to apply for certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The question presented for review is whether the purchase of imported bitumen and its processing, storage and subsequent resale by local asphalt producers constitutes a transaction in interstate or foreign commerce within the scope of Ch. 647, 26 Stat. 209, 15 U.S.C., § 1.

The statute which the case involves is set forth in the appendix.

By an amended complaint it was alleged that the defendants exercised control over the production and distribution of hot mix asphalt and that they had illegally restrained and burdened interstate and foreign commerce in that they had manufactured this product which was composed of materials available in the Southern District of Florida and bitumen, a petroleum product which is shipped into the state in interstate and foreign commerce; that the principal use of the end product was in the paving of highways, streets, roads and parking lots in order to adapt them to vehicular traffic and that the pattern of these highways was such that they interconnect with one another and with highways leading to the states of Georgia and Alabama and that throughout the year these highways carry heavy traffic originating outside of the State of Florida (R. 17).

Also it was charged that the price of hot mix asphalt directly affected the cost of construction of such highways, roads and streets, which was borne by the users thereof and the residents of the United States (R. 18).

Further the complaint charged that this action resulted in a major portion of the cost of the highways being borne by interstate users since so much of the cost was drawn

from revenues generally imposed by taxing the sale of gasoline (R. 18).

Additionally it was claimed that the equipment used by the producers of hot mix asphalt was procured mainly from sources outside the state; that the equipment used by persons engaged in paving the roads and streets was procured from sources beyond the state boundaries and furthermore that the Wage and Hours Division of the United States Department of Commerce had determined that firms engaged in paving roads and streets were subject to the provisions of 29 U.S.C. 81 (Fair Labor Standards Act) (R. 19).

The petitioner's motion to dismiss (R. 30) was granted (R. 33) and the plaintiff appealed (R. 32).

The Court of Appeals reversed, saying in part:

> "We think that this complaint alleges facts on which relief could be granted on two grounds, first this Court has held that contractors engaged in the construction of interstate highways and other facilities of interstate commerce are engaged 'in commerce.' * * * Thus, we conclude that the allegation that the local conspiracy has artificially set prices for materials which its members sell or install for the construction of arteries of interstate commerce, is an adequate allegation of a conspiracy in interstate commerce.
>
> Moreover, for the second point, we think the allegations of the manner in which the conspiracy, even though it be 'local' in nature, affects commerce are sufficient to withstand a motion to dismiss."

The reasons why the writ should be granted are 1) that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court in that this Court has not held that the transactions set forth in the information are within the

terms of the antitrust laws. 2) That the decisions of this Court on the few cases comparable to this indicate that the Court of Appeals' decision is in conflict with pronouncements of this Court.

I.

THE STATEMENT OF THE COURT BELOW THAT THE TRANSACTION WAS IN INTERSTATE COMMERCE BECAUSE HOT MIX ASPHALT WAS APPLIED TO THE SURFACING OF INTERSTATE HIGHWAYS AND OTHER FACILITIES FOR INTERSTATE COMMERCE PREDICATES CAUSE UPON EFFECT.

The Court of Appeals did not make it clear how contractors engaged in constructing interstate highways could convert an alleged agreement respecting the local sale of a home-made product into a transaction affecting interstate commerce.

From the Court's opinion it appears that if R. H. Wright sold hot mix asphalt to a contractor who—perhaps without Wright's knowledge—laid it on a street or highway which connected with other highways that ultimately passed over the Florida state line then R. H. Wright was engaged in interstate commerce. This conclusion is wrong or principle. How could the ultimate and uncontrolled use by a purchaser of an article in local commerce convert a lawful act of the seller into a criminal violation of the Sherman Act?

The Court's reasoning with respect to contractors engaged in interstate commerce does not apply to the case at bar. *Archer* v. *Brown & Root, Inc.*, (C.A. 5, 1957) 241 F.2d 663, cited by the Court, involved a construction of the Fair Labor Standards Act, 29 U.S.C. 201, 63 Stat. 910.

This act (202) provides:

"(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. (June 25, 1938, ch. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, ch. 736, § 2, 63 Stat. 910)."

The cited case was an action by employees working on the Lake Pontchartrain causeway to recover overtime compensation under the Wage & Hours Law. In its opinion the Court said (667):

"That it would be a link in the existing interstate system was indispensable to the planning, execution, financing and operation of this Expressway. Thus it was, within the teaching of Vollmer, 'so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity * * *,' 349 U.S. at page 429, 75 S. Ct. at page 862, 99 L. Ed. at page 1200.

Those working on the actual construction of it were, then under the Act."

Mitchell v. *Hooper Equipment Company*, (5 C.A. 1960) 279 F.2d 893, 897, is likewise a Fair Labor Standards Act case. Here the Court said:

"Under the Act statutory overtime is payable to any employee 'who is engaged in commerce or in the production of goods for commerce,' § 7, 29 U.S.C.A., § 207(a). As pointed out above, producing materials used directly in interstate facilities is the production of goods for commerce. Alstate Construction Co. v. Durkin, supra; Thomas v. Hempt Bros., supra. That takes us then to the statutory definition of 'goods,'[4] Now here the 'goods' being produced for commerce comprise cement and aggregate. Under the definition the 'goods' comprehends both the finished or delivered produce (cement or screened aggregate) and more important 'any part or ingredient thereof.' Since the production contemplated in the statute concerns such 'goods' or any ingredient thereof, those employees who produced the aggregate which goes into the cement delivered for interstate facilities are automatically engaged in the production of goods for commerce. It simplifies the problem greatly to set out again the statutory definition of 'produced' in a way graphically to portray those activities which are (1) 'engaged *in* the production' of goods and (2) those related to but which are not *in* the production itself.[5] The Act provides:

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4. § 3. 'As used in the act— * * * (i) "Goods" means goods * * * products, commodities * * * or articles * * * of commerce of any character, or any part or ingredient thereof * * *.' 29 U.S.C.A. § 203(i).

5. The term is first broadly defined:

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on * * *." § 3(j), 29 U.S.C.A. § 203(j).

> "* * * for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed (1) in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or (2) in any closely related process of occupation directly essential to the production thereof * * *.' 29 U.S.C.A., § 203(j)." (Emphasis supplied)

Thus the Court below reasons that everyone subject to the Fair Labor Standards Act is likewise subject to the Anti-Trust Laws *ipso facto*. But this cannot be so. The object of the two acts is different and the language is different.

That the Court below recognized this appears from its opinion wherein it said:

> "* * * It is no argument to say that wage and hour cases are no authority for Sherman Act cases. Of course they are not necessarily authority to the extent that they *deny* coverage. On the other hand, if they grant coverage on the basis of the employees actually being engaged in commerce then they are authority for what constitutes interstate commerce." (Emphasis supplied)

The conclusion is a *non-sequitur*. It is not contended that R. H. Wright's employees are being denied benefits under the Act. What is contended for is that some unknown purchaser from Wright of hot mix asphalt might or could lay a paving surface on a street which connected with an interstate highway and thereby make the prior sale a transaction in interstate commerce. It is this wholly fortuitous and unpredictable event subsequent that is used to convert a prior lawful act into a crime. Thus liability depends upon the action of others who are unrelated to the original act.

II.

THE ALLEGATIONS OF THE MANNER IN WHICH THE ALLEGED CONSPIRACY, THOUGH LOCAL IN NATURE, AFFECTS COMMERCE WERE NOT SUFFICIENT TO WITHSTAND THE MOTION TO DISMISS.

In holding that the complaint was sufficient to state a cause of action, the Court of Appeals relied upon the decision of this Court in *United States* v. *Employing Plasterers' Ass'n of Chicago*, 347 U.S. 186 (1954). The facts of this case are radically different from those in the case subjudice.

In *United States* v. *Employing Plasterers' Ass'n of Chicago*, the complaint alleged that the defendant plastering contractors continued to suppress competition among local plastering contractors "to prevent out of state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the Union." The Court said that "the effect of this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry."

No such allegation as this appears anywhere in this record. There is no claim that the alleged activities of the petitioner had any effect whatever upon the quantity or price of bitumen which was transported into Florida from other states and foreign countries.

Also, *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949), presented a different factional situation. Here jobbers maintained sales offices in New York and engaged in nation-wide competition for orders chiefly by means of travelling salesmen who solicited throughout the country. Upon receiving orders, the jobbers would

buy the fabrics, cut them to the customers' taste, send the cut material to a contractor, who did the stitching, put on the accessories and returned the completed garment to the jobber. The jobber then promptly shipped them to the customer. This Court said that the jobbers maintained a current commerce substantial in volume and interstate in character. There is no possible relatio hip between what the jobbers did in the *Women's Sportswear* case and what the hot mix asphalt wholesalers did in this case. The petroleum, of which bitumen is obtained, is shipped in tankers by the owners to the tank farm at Port Everglades. Sooner or later sales are made to individual wholesalers in Fort Lauderdale, who, in turn, mix the bitumen with local aggregate and sell the new product to various and sundry local contractors.

There never is at any time anything resembling the continuity of movement that is evoked by the phrases "stream of commerce" or "current of commerce."

Some of the snow falling upon a mountain top in winter finds its way in the spring thaws down the slopes of the mountain and ultimately into streams and thence to the rivers and seas. Is a mountain villager who shovels the snow from his door engaged in interstate commerce because the melted snow will some day reach the Atlantic Ocean?

In *United States* v. *Starlite Drive-In, Inc.*, (C.A. 7th, 1953) 204 F.2d 419, the Court was faced with a situation in which several defendants, operators of drive-in theatres in Cook County, Illinois, were charged with having imposed an unlawful restraint upon the flow of motion picture films in interstate commerce. It seems that the agreement which was alleged to violate the Sherman Act was between local businesses and related solely to a busi-

ness which was typically *intrastate* in its nature. The agreement, said the Court, had nothing to do with the price which the distributor received for its film and the price which the exhibitor paid for it.

The Government in the *Starlite Drive-In* case evidently relied upon *Mandeville Island Farms, Inc.*, v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948). In that case this Court said that the question presented was whether the refiners' alleged agreement together with the allegations in the complaint concerning its effects show a conspiracy to monopolize and to restrain interstate trade and commerce or was one thus affecting only purely local trade and commerce.

In the sugar beet case the refiners controlled the supply of sugar beet seed. This control, in the terms of the contract entered into with the farmers, required them to buy the seed from the refiners. The seed could only be planted on land specifically described in the contract. The contract gave the refiners the right to supervise the planting, cultivation and harvesting of the beets. Before delivering the beets, the farmers must have made preliminary preparation for processing them into raw sugar. The refiner had the option to reject the beets, because the conditions were not complied with and the beets were not suitable for the manufacture of sugar.

In disposing of this case as an authority, the Court in the *Starlite Drive-In* case, said:

> "* * * Neither this case nor any other, however, supports the theory advanced here that local activities are illegal simply because they concern articles which have previously moved in interstate commerce. Nor do they hold that a price-fixing agreement between local retailers dealing in a product produced in another state is illegal in the absence of a

specific showing of the effect of the conspiracy on interstate commerce."

The beneficent purposes of the Sherman Act do not justify its extension to cases not falling clearly within its terms on the theory that one cannot have too much of a good thing. Quite the contrary is true. A drop or two of some medicine will cure an illness, whereas a few more drops will kill the patient.

The Sherman Act was not intended as an instrumentality by which Congress could control all local activities. It is essential to the orderly operation of the several governments that exist in the United States that there be rendered unto Caesar only those things that are Caesar's.

CONCLUSION

The judgment of the lower Court should be quashed with directions to reinstate the judgment of the United States District Court for the Southern District of Florida.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19549

CITY OF FORT LAUDERDALE,
Appellant,

versus

EAST COAST ASPHALT CORPORATION, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.
(March 26, 1964.)

Before TUTTLE, Chief Judge, and WISDOM and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This case is related to the case of *Hardrives Co., Inc., et al.* v. *East Coast Asphalt Corp., et al.*, No. 19,864, 5 Cir., ... F.2d . . . , and the case of *United States* v. *South Florida Asphalt Co., et al.*, No. 19,635, 5 Cir., ... F.2d . . . ., both decided this same date. The conduct about which complaint is made is the violation of the Sherman and Clayton Acts. This appeal is from an order dismissing the complaint of the City wherein an injunction and treble damages were sought.

The record is not clear, but apparently the trial judge dismissed the complaint because he considered that the goods and materials alleged to be involved came to rest in the state of ultimate consumption prior to the sale of the same to the parties who finally utilized them; and that such fact eliminated the "in commerce" character of the goods.

The allegations of the complaint in this case are substantially the same as in the *Hardrives* case. This Court has repeatedly held that complaints in civil cases should not be dismissed unless it clearly appears that under no theory can the plaintiff be entitled to relief. *DesIsles* v. *Evans*, 5 Cir., 200 F.2d 614; *City of Daytona Beach* v. *Gannett*, 5 Cir., 253 F.2d 771; *Mannings* v. *Board of Public Education, etc.*, 5 Cir., 277 F.2d 370.

We think that this complaint alleges facts on which relief could be granted on two grounds, first this Court has held that contractors engaged in the construction of interstate highways and other facilities of interstate commerce are engaged "in commerce." *Archer* v. *Brown & Root, Inc.*, 5 Cir., 241 F.2d 667, cert. denied 355 U.S. 825; *Mitchell* v. *Hooper Equipment Co.*, 5 Cir., 279 F.2d 893. The Supreme Court has, of course, held likewise. *Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427. It is no argument to say that wage and hour cases are no authority for Sherman Act cases. Of course they are not necessarily authority to the extent that they *deny* coverage. On the other hand, if they grant coverage on the basis of the employees actually being engaged in commerce then they are authority for what constitutes interstate commerce. Thus, we conclude that the allegation that the local conspiracy has artificially set prices for materials which its members sell or install for the construction of arteries of in-

terstate commerce, is an adequate allegation of a conspiracy in interstate commerce.

Moreover, for the second point, we think the allegations of the manner in which the conspiracy, even though it be "local" in nature, affects commerce are sufficient to withstand a motion to dismiss. In *United States* v. *Employing Plasterers Assoc. of Chicago*, 347 U.S. 186, the Supreme Court said, in a *criminal* case:

> "The complaint charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of facts' or 'mere conclusions of the pleader', we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.
>
> "We are not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of the plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases. See Mandeville Island Farms v. American Crystal Sugar Company, 334 U.S. 219, 232."

We think that the conspirary alleged in this case dealing with the type of business in which the appellees are engaged falls well within the reasoning of this case.

See also *United States* v. *Women's Sportswear*, 336 U.S. 460.

The judgment of dismissal was in error.

The judgment is REVERSED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion.

APPENDIX B

Title 15, U.S.C.—Commerce and Trade, § 1.

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or con-

spiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 1, 26 Stat. 209; August 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282.)"